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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,
SAN FRANCISCO DIVISION

GUARDANT HEALTH, INC.,

Plaintiff and Counterclaim-
Defendant,

vs.

NATERA, INC.,

Defendant and Counterclaim-
Plaintiff.

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Case No. 3:21-CV-04062-EMC

**NATERA, INC.'S OPPOSITION TO
GUARDANT HEALTH INC.'S MOTION
FOR ATTORNEYS' FEES & COSTS**

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INTRODUCTION

The Court should defer consideration of Guardant’s request for attorneys’ fees and costs until after Natera’s appeal of the merits is resolved. Courts in the Ninth Circuit consistently defer ruling on fees motions until after appeals are resolved to avoid situations where the district court’s ruling on a fees motion is premised on considerations that change after appeals are decided.

But if the Court decides Guardant’s motion now, it should be denied in its entirety.¹ Guardant is not entitled to any attorneys’ fees and costs, much less the over \$27 million it seeks, representing the entirety of fees and costs incurred since the inception of this litigation.

An award of attorneys’ fees in Lanham Act cases is an extraordinary result, limited to “exceptional” cases under the Act and even then only awarded in the Court’s discretion. Here, this case went to the jury because the Court repeatedly determined there were genuine issues of fact regarding both Natera’s counterclaims and its defenses against Guardant’s claims. It was entirely reasonable for Natera to defend its commercial statements, and to seek relief for Guardant’s statements, and to do so vigorously. The scattered issues that Guardant identifies in its motion do not transform this case into an “exceptional” one and certainly do not provide a basis for this Court to exercise its discretion to grant Guardant all of its fees and costs over the entirety of this case.

Guardant’s motion also fails because Guardant failed to satisfy its burden to prove that the entirety of fees accrued in this case were incurred for work reasonably performed on Guardant’s Lanham Act claim, the only grounds for which it is seeking (or could be entitled to) fees.

Likewise, Guardant’s request for costs should be rejected. Guardant’s scant supporting documentation—containing questionable entries for obtaining videos of every deposition, excessive travel and lodging, and vague allusions to consultants and experts who never appeared in this case—is woefully inadequate.

¹ Since Guardant addresses its request for fees and costs related to COBRA in its separate Motion For Monetary Sanctions, Natera responds to those points in its opposition to that motion. To the extent Guardant incorporates its arguments from its Motion for Monetary Sanctions into its Motion for Attorneys’ Fees and Costs, Natera similarly incorporates its opposition arguments.

ARGUMENT

I. THE COURT SHOULD DEFER CONSIDERATION OF ATTORNEYS' FEES & COSTS UNTIL AFTER MERITS APPEALS ARE RESOLVED

Natera's post-trial motion for judgment as a matter of law or, in the alternative, for a new trial, raises several issues related to the jury's findings on Guardant's Lanham Act claim. *See* Dkt. 880. And to the extent the jury's verdict stands, Natera will appeal, raising "a significant potential" that the Ninth Circuit's ruling would modify the liability findings on which Guardant's motion is premised. *Jones v. Cnty. of Tulare, Cal.*, 2024 WL 3673150, at *2 (E.D. Cal. Aug. 5, 2024). In these circumstances, it is "most prudent to defer ruling on the requests for costs and attorney's fees until [any] appeal is resolved." *Id.*; *see also Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 742 F.3d 377, 386 (9th Cir. 2014) (vacating fee award and remanding for reconsideration "because many of the factors on which the district court based its attorneys' fee decision have now changed"); *Freeman Inv. Mgmt. Co., LLC v. Frank Russell Co.*, 2017 WL 11420268, at *1 (S.D. Cal. Feb. 9, 2017) (denying without prejudice motion for attorneys' fees pending appeal on the merits); *Madrid v. Concho Elementary School Dist. No. 6 of Apache Cnty.*, 2010 WL 2991562, at *1 (D. Ariz. July 26, 2010) (deferring consideration of fee motion until after resolution of appeal).

Especially given the number and significance of the post-trial issues in this case, "the interests of judicial efficiency weigh strongly in favor of waiting for a mandate from the [appellate court] before awarding or denying attorney fees or costs." *In re Farmers Ins. Exchange Claims Rep. Overtime Pay Litig.*, 2009 WL 3834034, at *3 (Nov. 13, 2009); *Derringer v. Sewell*, 2009 WL 2424662, at *1 (D. Ariz. Aug. 7, 2009) (denying request for fees without prejudice pending appeal); *Timmons v. United Parcel Serv., Inc.*, 2007 WL 3026618, at *1 (E.D. Cal. Oct 16, 2007) (same). The Court should "defer its ruling on the motion, or may deny the motion without prejudice" until after Natera's appeal is resolved. Fed. R. Civ. P. 54(d) advisory committee's note (1993).

II. THIS IS NOT AN "EXCEPTIONAL" CASE WARRANTING ATTORNEYS' FEES

The Lanham Act provides that a court may award reasonable attorneys' fees to the prevailing party only in "exceptional cases." 15 U.S.C. § 1117(a). An "exceptional" case is one that "stands out from others with respect to the substantive strength of a party's litigating position (considering

1 both the governing law and the facts of the case) or the unreasonable manner in which the case was
 2 litigated.” *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179, 1180 (9th Cir. 2016)
 3 (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014)). In
 4 determining whether a case is exceptional, a court should consider “frivolousness, motivation,
 5 objective unreasonableness [] and the need in particular circumstances to advance considerations of
 6 compensation and deterrence.” *Id.* at 1181 (citing *Octane Fitness*, 572 U.S. at 554).²

7 The fact that one party won—even decisively—does not automatically render the case
 8 exceptional or the losing party’s case unreasonable; otherwise, there would be an award of fees in
 9 every case. “An award of attorneys’ fees is not warranted where a party puts forth good faith
 10 arguments and evidence supporting those claims.” *Blue Bottle Coffee, LLC v. Liao*, 2024 WL
 11 4004047, at *3 (N.D. Cal. July 24, 2024) (citing *Caiz v. Roberts*, 2017 WL 830386, at *5 (C.D. Cal.
 12 Mar. 2, 2017)); see *Globefill Inc., v. Elements Spirits, Inc.*, 756 F. App’x 764, 766 (9th Cir. 2019)
 13 (affirming determination that the case was not exceptional where the losing party had reasonable
 14 litigation positions). Even where a jury has found willfulness, courts decline to find a case
 15 exceptional where the party “did not adopt an objectively unreasonable litigation position.” *Enplas*
 16 *Display Device Corp. v. Seoul Semiconductor Co., Ltd.*, 2016 WL 4208236, at *9 (N.D. Cal. Aug.
 17 10, 2016), *aff’d in part, vacated in part on other grounds, remanded*, 909 F.3d 398 (Fed. Cir. 2018).

18 **A. Natera’s Asserted Claims And Defenses Were Reasonable, And Natera Put**
 19 **Forth Good Faith Arguments And Evidence**

20 Courts in this district consistently hold that a case is not exceptional where the non-
 21 prevailing party’s litigation positions were reasonable. See *Angioscore, Inc. v. Trireme Med., Inc.*,
 22 2015 WL 8293455, at *2 (N.D. Cal. Dec. 9, 2015) (although defendant prevailed entirely, no
 23 exceptional case where claims survived summary judgment, and the case was reasonably litigated
 24 by all parties); *Netlist, Inc. v. Diablo Techs., Inc.*, 2015 WL 5157315, at *2 (N.D. Cal. Sept. 1, 2015)
 25 (despite complete defense verdict, no exceptional case where plaintiff submitted credible evidence
 26

27 ² The Ninth Circuit explained in *SunEarth* that it “interpret[s] the fee-shifting provisions in the
 28 Patent Act, 35 U.S.C. § 285, and the Lanham Act in tandem” because “[t]he fee-shifting provisions
 in both acts are ‘parallel and identical.’” 839 F.3d at 1180 (internal citation omitted).

1 and expert testimony, thereby making the case not objectively unreasonable), *aff'd*, 667 F. App'x
 2 774 (Fed. Cir. 2016); *Gonzalez v. Tagged, Inc.*, 2016 WL 4376343, at *3 (N.D. Cal. Aug. 17, 2016)
 3 (despite complete defense verdict, no exceptional case where a magistrate judge's recommendation
 4 of denial of summary judgment suggested that plaintiff's underlying lawsuit was not objectively
 5 unreasonable).³ Guardant's reliance on *Location Based Servs., LLC v. Niantic, Inc.*, 2018 WL
 6 7569160, at *1 (N.D. Cal. Feb. 16, 2018), cited Dkt. 585-2 at 9, is misplaced. There, the court
 7 **declined** to award attorneys' fees where losing party presented "a good faith argument" in opposing
 8 a motion to dismiss.

9 Here, Natera at all times put forward objectively reasonable defenses to Guardant's Lanham
 10 Act claim and reasonably pursued its own claims against Guardant.

11 1. Natera's Defenses to Guardant's Lanham Act Claim Were Reasonable

12 Guardant knows that it cannot carry its burden to establish this is an "exceptional" case
 13 warranting fees, so it is forced to resort to the false exaggeration that "Natera never offered a
 14 meaningful defense of its false comparisons." Dkt. 885-2 at 9. The record, however, proves
 15 otherwise. Most notably, the Court *granted* Natera's motion for summary judgment as to
 16 Guardant's quantitation claim, finding that "Natera's quantitation claim is not literally false nor has
 17 it actually deceived consumers." Dkt. 326 at 25. And, on the eve of trial, Guardant stopped pursuing
 18 its claim that Natera's statements regarding the "CHIP Filter" were false in light of Natera's strong
 19 evidence to the contrary. These facts all indicate that Natera's litigation positions were objectively
 20 reasonable. *See Angioscore*, 2015 WL 8293455 at *2; *Enplas Display Device Corp.* 2016 WL
 21 4208236, at *8 (finding the defendant did not adopt an objectively unreasonable litigation position
 22 where its defense had survived summary judgment and the prevailing party had dropped some
 23 claims before trial).

24 Even as to Guardant's claims that went to the jury, the Court found that "all Natera's
 25 advertising statements at issue are directly derived from the Reinert study and the Parikh study" and

26
 27 ³ The strength of Natera's case—although it did not prevail—distinguishes it from *Pop Top Corp.*
 28 *v. Rakuten Kobo Inc.*, 2022 WL 267407, at *3, *5 (N.D. Cal. Jan. 28, 2022), cited Dkt. 585-2 at 9,
 where plaintiff "never advanced factual support for its position," "never offered evidence supporting
 its claim," and "did not submit any evidence in opposition to Kobo's summary judgment motion."

1 that the advertised “numbers are not literally false on their face.” Dkt. 326 at 13. At trial, Natera
 2 proffered evidence that it believed all of the data in its advertisements were true. *See* Tr. 662:12-14
 3 (Masukawa) (“Q. As you sit here today, are you still comfortable presenting this information in this
 4 format? A. Yes.”); Tr. 1075:20-22 (Chapman) (“Q. Do you believe that Natera’s advertisements
 5 and what Natera put out into the community are true and accurate? A. Yes.”); Tr. 1481:23-1482:23
 6 (Moshkevich) (describing steps Natera takes to ensure accuracy of statements). Guardant agrees
 7 the advertisements cited accurate data from scientific studies—including its own Parikh study. Tr.
 8 460:14-461:9 (Price); Tr. 1271:4-9 (Heitjan). Dr. Metzker, Natera’s expert, also testified the
 9 performance comparisons in Natera’s advertisements were scientifically valid, and “all the data that
 10 are described in [Natera’s] advertisements are accurately reported.” Tr. at 1739:10-20 (Metzker).

11 As to Guardant’s claim that it was false by implication to *compare* data from the Parikh and
 12 Reinert studies, Natera adduced evidence throughout the case, and presented it at trial, showing it
 13 was reasonable, and not misleading, to directly compare data from the studies. For example,
 14 Guardant internal documents showed that, long before any of Natera’s advertisements, Guardant
 15 *itself* was comparing data from the studies, side-by-side, without any caveats about supposed
 16 differences in sample volumes, scanning frequencies, or patient populations. *E.g.* TX585.7; TX507;
 17 TX729. Guardant even directly and explicitly compared data from these studies in its own
 18 advertisements to doctors. TX554; TX1810. The Parikh study further invites comparison—
 19 mentioning the Reinert study *four* times and drawing express comparisons to tumor-informed assays
 20 (i.e. Signatera) *seven* times. TX1. As the lead author and Guardant’s expert witness, Dr. Parikh
 21 specifically testified that the Parikh study was intended to be and designed to be comparable to
 22 Reinert. Dkt. 809-3 (Parikh Tr.) at 25:16-22. She also explained that the reason she personally
 23 preferred Signatera to Reveal was that Reveal did not have enough data supporting its
 24 performance—exactly the point Natera had been conveying to the oncology community to combat
 25 misinformation about Reveal’s efficacy. Dkt. 809-4 (Parikh Tr.) at 91:19-24 (“I’ve expressed this
 26 to Guardant, kind of time and time again, I think the onus is on them to [] provide the community
 27 more data. So I think that’s why I have leaned away a little bit more, is just the robustness and []
 28 volume of data that we have for Signatera.”).

1 Indeed, even Guardant’s *own* witnesses confirmed that comparing data from Parikh and
 2 Reinert was not false or misleading. Tr. 385:17-386:7 (Odegaard) (“Q. You and Guardant believe
 3 this is a fair comparison to make [between Parikh and Reinert]? A. It is.”). Guardant’s expert, Dr.
 4 Heitjan, testified that certain comparisons in Natera’s advertisements (*e.g.* hazard ratio) were apples-
 5 to-apples. Tr. 1296:10-17 (“Q: So it’s apples-to-apples in your [opinion]? A: Yes.”). And the
 6 evidence at trial showed that Guardant’s own salespeople compared Reveal’s and Signatera’s
 7 respective performance metrics from Parikh and Reinert, including when communicating with
 8 oncologists. TX554; TX1810; Trial Tr. 446:17-19 (Price) (“Q. And in any of those sales trainings,
 9 did you compare some of the data from Signatera with Reveal? A. Yes, I did.”); Tr. 482:7-9 (Price)
 10 (“Q. So Mr. Outzen is comparing the performance metrics he’s writing about to Signatera’s
 11 performance; correct? A. Similarly to how it’s worded in the Parikh paper, yes.”).

12 In response to Guardant’s argument that different plasma sample volumes used in the Parikh
 13 and Reinert studies rendered Natera’s comparisons misleading, Natera offered evidence that, in
 14 designing the Parikh study to be comparable to the Reinert study, Guardant readily approved the
 15 sample volume used in the Parikh study. TX501.8 (“Re: plasma amounts, great[.] 4-5 mL will work
 16 for those timepoints with more limited volume.”). Natera also elicited testimony from Guardant
 17 witnesses that Guardant itself does not disclose sample volumes in its advertising for Reveal. Tr.
 18 971:7-14 (Banks). Moreover, Guardant scientist Victoria Raymond testified that Reveal did not
 19 require a minimum sample volume or amount of DNA (measured in nanograms (ng)) to detect
 20 ctDNA. Tr. 1130:24-1132:19 (Raymond). In fact, Guardant used an approach based entirely on
 21 samples passing Quality Control (QC) and Quality Assurance (QA) metrics to confirm reliability of
 22 the test’s cancer detection results irrespective of sample volume. Tr. 1132:13-23, 1134:13-1136:7
 23 (Raymond); TX501.9-10. Dr. Metzker further testified that the sample volume does not necessarily
 24 affect a test’s ability to detect cell-free DNA because “there are ways of delivering the same amount
 25 of cell-free DNA even if the volume of plasma is different.” Tr. 1681:8-1681:20 (Metzker).
 26 Guardant’s expert, Dr. Heitjan, confirmed this, testifying that it is conceivable to have a low-volume
 27 sample that “still has a lot of cell-free DNA.” Tr. 1275:24-1276:6 (Heitjan) (“Q. [Y]ou can have a
 28 low-volume sample that still has lot of cell-free DNA; right? A. Yeah, conceivably. . . Q. [T]he

1 cell-free DNA input is what the Reveal and the Signatera tests actually test; right? A. Right.”).

2 Unable to identify anything about Natera’s defense that rendered it objectively unreasonable
3 (as opposed to just ultimately unsuccessful), Guardant instead makes several *non sequitur* attacks
4 about Natera’s experts’ trial testimony. Guardant first argues, without citing any authority at all,
5 that Natera’s defense was unreasonable because Dr. Betensky—one of Natera’s three experts—
6 “offered no defense for Natera’s advertisements.” Dkt. 885-2 at 9. But Dr. Betensky’s expertise is
7 “biostatistics and statistical methods for the design and analysis of clinical studies.” Tr. 1817:23-
8 25 (Betensky). As such, Dr. Betensky opined “about the Parikh study and, in particular, issues
9 regarding blinding and prospectiveness.” Tr. 1823:19-20 (Betensky). In short, Dr. Betensky opined
10 on Natera’s affirmative claims, while Natera’s two other experts—Dr. Metzker and Dr.
11 McDonald—both provided opinions defending Natera’s advertisements. Guardant identifies
12 nothing unreasonable about the subject matter Dr. Betensky actually addressed, nor does any
13 authority suggest that a party’s defense is somehow unreasonable where the scope of an expert’s
14 testimony is appropriately supported. Guardant’s assertion that Natera “tried to mislead the jury”
15 with Dr. Metzker’s testimony (Dkt. 885-2 at 9) is similarly baseless and unsupported by the record.
16 Dr. Metzker has decades’ worth of expertise in human genetics and diagnostic technology
17 leveraging cell-free DNA, and the Court recognized that Dr. Metzker’s “opinions on whether
18 Natera’s marketing statements accurately reflect published data are factual and within his scientific
19 expertise.” Dkt. 323 at 16. Guardant’s complaint that Dr. Metzker has “no medical degree” (Dkt.
20 885-2 at 9) is particularly puzzling given that none of Guardant’s own experts have medical degrees.

21 Guardant also argues that the jury’s “substantial” monetary award should “support the
22 decision to assess fees.” Dkt. 885-2 at 10 (citing *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*,
23 778 F.3d 1059, 1080 (9th Cir. 2015)). But Guardant’s own authority belies that position. In *Fifty-*
24 *Six Hope*, the district court **denied** the prevailing party’s request for attorneys’ fees, and the Ninth
25 Circuit affirmed that decision. *Id.* And in *Grasshopper House* (cited Dkt. 885-2 at 10), the Ninth
26 Circuit vacated the district court’s ruling on disgorgement, and remanded for consideration of
27 attorneys’ fees because the court “must consider the totality of circumstances”—it by no means
28 granted a motion for fees, let alone pronounced some rule that any substantial damages award

1 necessitates a fee award. *Grasshopper House LLC v. Clean & Sober Media, LLC*, 2021 WL
 2 3702243, at *4 (9th Cir. Aug. 20, 2021) (citing *SunEarth, Inc.*, 839 F.3d at 1181). Guardant cites
 3 no other authority to support its assertion that the jury’s award warrants attorneys’ fees. Nor can
 4 it—it is well settled that “a positive result does not transform a claim into an ‘exceptional case.’”
 5 *BillFloat Inc. v. Collins Cash Inc.*, 105 F.4th 1269, 1278 (9th Cir. 2024).

6 2. Natera Reasonably Pursued Its Affirmative Claims

7 To establish that this is an “exceptional” case, Guardant would need to show that Natera’s
 8 affirmative claims were “frivolous” or “objectively unreasonable” (*Octane Fitness*, 572 U.S. at
 9 554), but Guardant cannot come close to meeting that burden. Most of Natera’s claims survived
 10 summary judgment, which establishes that the claims were not frivolous or objectively
 11 unreasonable, as this Court determined there were genuine disputes of material fact that needed to
 12 be resolved by the jury. *See* Dkt. 326 (denying in part Guardant’s motion to dismiss Natera’s claims
 13 because a “reasonable jury” could find for Natera); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871,
 14 887 (9th Cir. 2016) (vacating award of fees because where “a claim . . . hinges on disputed facts
 15 sufficient to reach a jury, that claim necessarily is reasonable because a jury might decide the case
 16 in the [claimant’s] favor.”); *BillFloat*, 2023 WL 2333879 at *7 (case was not exceptional because
 17 non-prevailing party’s “claim survived summary judgement,” and “a positive result does not
 18 transform a [] claim into an ‘exceptional case’”), *aff’d*, 105 F.4th 1269, 1278 (9th Cir. 2024). Indeed,
 19 Guardant does not cite a single case in support of its argument that Natera’s counterclaims were so
 20 weak as to justify an award of fees. *See* Dkt. 885-2 at 10-11.

21 As the Court recognized, a “reasonable jury could find that the Parikh study’s claim that the
 22 analysis was ‘blinded’ was false.” Dkt. 326 at 35-36 (finding that “[d]epending on the definition of
 23 ‘prospective’ accepted by the jury, a jury could reasonably find the statements that the Parikh study
 24 is a ‘prospective’ study was false.”). The Court also denied Guardant’s summary judgment motion
 25 as it related to Natera’s claim that Guardant’s statements of 100% specificity and 91% sensitivity
 26 were literally false or false by necessary implication. *Id.* at 40. And the Court found that Guardant’s
 27 “blindedness,” “prospectiveness,” and “sensitivity and specificity” claims “could influence
 28 oncologists’ purchasing decisions” as they are “key” metrics in assessing “whether a ctDNA assay

1 is suitable for MRD detection.” *Id.* at 41. There was nothing frivolous about these claims.

2 Nor was it “objectively unreasonable” for Natera to pursue these claims through trial,
 3 especially given the evidence Natera obtained supporting them. Guardant advertised that the Parikh
 4 study established Reveal’s performance in the surveillance setting—i.e., where patients are tested
 5 at regular intervals over time to monitor for recurrence. TX573; TX576; TX554; TX1810. But Dr.
 6 Parikh herself testified that the Parikh Study *did not evaluate Reveal in the surveillance context*,
 7 and “has not established that Reveal has any particular specificity, sensitivity, or PPV for patients
 8 who are undergoing surveillance monitoring.” Dkt. 809-3 (Parikh Tr.) at 30:4-7; 32:12-15; 32:17-
 9 18. Guardant went further, advertising that Reveal had 100% specificity in the surveillance setting
 10 “for recurrence detection[.]” TX573; *see also* TX554; TX1810. Internally, however, Guardant
 11 employees acknowledged that they “do not know the specificity [] in the surveillance setting because
 12 we did not do this analysis with patients who did not recur.” TX559. Even six months into
 13 Guardant’s advertising campaign claiming 100% surveillance specificity, employees continued to
 14 warn, “we don’t have surveillance specificity for CRC - landmark specificity only.” TX637.2. At
 15 trial, Guardant’s first witness admitted that “it would not be accurate to say in marketing materials
 16 that this was 100 percent specificity in the surveillance setting” and that the surveillance specificity
 17 calculation Guardant advertised was “not clinically meaningful.” Tr. 380:12-18, 381:21-382:5
 18 (Odegaard). Guardant’s witnesses went on to testify that the Parikh study did not—and could not—
 19 establish surveillance specificity for Reveal, contrary to Guardant’s advertisements for Reveal that
 20 did claim 100% surveillance specificity. Tr. 131:16-20 (Odegaard) (“Q: Since there are
 21 nonrecurring patients in there, you can’t calculate a specificity from that; right? A: Correct.”); Dkt.
 22 809-3 (Parikh Tr.) at 31:18-22 (Q. “your study does not establish Reveal’s clinical performance in
 23 the Surveillance Program, right? [A.] No, it does not.”); *see also* TX576. Guardant similarly
 24 claimed it had 100% PPV in the surveillance setting, again based on the Parikh Study. TX538.9.
 25 But Dr. Parikh testified at her deposition that Reveal does not have 100 percent PPV *at all*. Dkt.
 26 809-4 (Parikh Tr.) at 51:3-13 (“Q. Reveal doesn’t actually have 100 percent PPV; right? A. No,
 27 Reveal doesn’t have 100 percent PPV.”).

28 Guardant also widely circulated advertisements claiming that Reveal detects ctDNA with

1 91% sensitivity in the surveillance setting, supporting the use of Reveal in “regular, 3-month interval
 2 blood draws for increased sensitivity.” TX576. Yet, in internal email communications, Guardant’s
 3 own employees acknowledged that Guardant “cannot” make such claims because it had not done
 4 any analysis to support them. TX559 (“[W]e cannot say that with blood draws every 3-4 months in
 5 the surveillance setting the tests sensitivity will be 91%.”).

6 Regardless of whether Natera prevailed at trial, Natera’s claims were objectively reasonable,
 7 and attorneys’ fees are not warranted. Indeed, “[if] every case in which a [party] prevailed on a
 8 motion or at trial on [their] claim[s] required an award of attorneys’ fees, the Lanham Act’s
 9 instruction to courts to award attorney’s fees only in exceptional cases would be meaningless.” *See*
 10 *Blue Bottle Coffee, LLC*, 2024 WL 4004047, at *4 (declining to award fees, even where plaintiff
 11 failed to establish standing, lost “many” motions, and lost at summary judgment).

12 **B. The Jury’s Finding Of Willfulness Does Not Warrant Attorneys’ Fees**

13 Willful conduct is not “the hallmark of exceptional cases” as Guardant claims. Dkt. 885-2
 14 at 1, 3. To the contrary, case law is clear that a jury’s finding of willfulness does not compel a
 15 finding of an exceptional case warranting attorneys’ fees. *Watec Co., Ltd. v. Liu*, 403 F.3d 645, 656
 16 (9th Cir. 2005) (holding that the determination as to whether a “case is exceptional is a question of
 17 law for the district court, not the jury” (internal quotation marks and citation omitted)). In *Watec*,
 18 the court awarded fees because the “jury expressly found that defendant ... intentionally infringed
 19 on plaintiff’s trademarks, and recommended an award of fees.” *Id.* The Ninth Circuit noted that
 20 this approach to awarding fees was “problematic” because “the jury’s finding that [defendant]
 21 ‘intentionally infringed’ does not necessarily equate with malicious, fraudulent, deliberate or willful
 22 conduct that we usually require before deeming a case exceptional.” *Id.* Indeed, courts routinely
 23 decline to award attorneys’ fees even where the jury has found willfulness. *See, e.g., Baden Sports,*
 24 *Inc. v. Kabushiki Kaisha Molten*, 2007 WL 2790777, at *7 (W.D. Wash. Sept. 25, 2007) (declining
 25 to award attorneys’ fees after finding of willful false advertising where party “reasonably disputed
 26 the Lanham Act claim”); *Enplas*, 2016 WL 4208236, at *9 (N.D. Cal. 2016) (“although [defendant]
 27 willfully infringed the patents ... this case does not warrant [] attorneys’ fees” because defendant
 28 “did not adopt an objectively unreasonable litigation position ... and advanced reasonable claims []

1 at trial”); *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 2016 WL 4377096, at *22 (S.D.
 2 Cal. Aug. 17, 2016) (declining to award attorneys’ fees following willful infringement finding in a
 3 “garden-variety hard-fought patent infringement action between two competitors”), *aff’d in part*,
 4 *vacated in part on other grounds, remanded*, 875 F.3d 1369 (Fed. Cir. 2017).

5 *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 834 (9th Cir. 2011), on which
 6 Guardant relies (Dkt. 885-2 at 8), is not to the contrary. There, the Ninth Circuit remanded for
 7 consideration of attorneys’ fees where defendants indisputably knew their website confused and
 8 misled consumers. *Id.* at 833. Guardant presented no such evidence here. Indeed, the only
 9 consumer of the parties’ products who testified in this case was Dr. Parikh, who explained that she
 10 preferred Signatera to Reveal not because she was confused by Natera’s advertisements (much less
 11 that Natera *intended* to confuse consumers), but because there was more data supporting the
 12 performance of Signatera. Dkt. 809-4 (Parikh Tr.) at 91:8-11.

13 The evidence that Guardant’s motion cites, and often mischaracterizes, as supposedly
 14 establishing Natera’s willfulness falls far short of what courts have found to render a case
 15 exceptional. As an initial matter, Natera did not ignore Guardant’s pre-suit cease-and-desist letter
 16 or Guardant’s complaint as Guardant suggests. Dkt. 885-2 at 7. After receiving Guardant’s cease-
 17 and-desist letter on May 21, 2021, Natera reviewed the letter, looked into Guardant’s claims, re-
 18 evaluated the underlying data, and concluded that Natera’s “data and [] advertisements remained
 19 valid.” Tr. 1523:18-1524:2; 1524:19-1525:12. Natera also held a training to educate its salespeople
 20 on Guardant’s claims and ensure they were familiar with the relevant supporting data so that they
 21 would not misstate any data. TX76. On May 27, 2021, a mere six days after sending the cease-and-
 22 desist, Guardant filed its complaint. Dkt. 1. By June 4, Natera had agreed to discontinue its
 23 comparative advertisements, and the parties entered the Joint Statement. Dkt. 25.

24 Guardant also argues that Natera’s two weeks of “continued” advertising is “evidence of
 25 ‘willfulness’ that justifies finding the case to be ‘exceptional[.]’” Dkt. 885-2 at 7. Unable to support
 26 that position with relevant law, Guardant relies on a single quote from the disgorgement analysis in
 27 *Monster Energy Co. v. Integrated Supply Network, LLC*, 533 F. Supp. 3d 928, 933 (C.D. Cal. 2021),
 28 where the court held that a party’s continued advertising *all the way through trial* could support a

1 disgorgement award, but did not even address attorneys' fees. In addition, *Monster Energy* is easily
 2 distinguishable. There, the defendant sold infringing products for *eight years*, including *through*
 3 *the jury's verdict*. *Id.* at 932, 937. By contrast, here, within *eight days* of Guardant filing its
 4 complaint (and barely two weeks after Guardant sent its pre-suit cease-and-desist letter), Natera
 5 agreed to discontinue *any* comparative advertisements.⁴ Dkt. 1; Dkt. 25; TX127.

6 Contrary to Guardant's assertions (Dkt. 885-2 at 12), Natera's requests to dissolve the Joint
 7 Stipulation prior to trial were not made in bad faith, and do not make this an "exceptional" case. If
 8 anything, it was Guardant that manipulated the Joint Stipulation. The parties entered the Joint
 9 Stipulation as a temporary stopgap to maintain the status quo until Guardant [REDACTED]

10 [REDACTED]. Dkt. 25.3 at 1 ("[REDACTED]
 11 [REDACTED]
 12 [REDACTED]"). The parties both expected, and expressly represented in the Joint Statement, that Guardant
 13 would [REDACTED] *Id.* at 3.

14 Instead, Guardant never filed its motion, [REDACTED]
 15 [REDACTED]. While the Court disagreed with Natera's position
 16 that the Joint Stipulation had expired or should sunset given the changed circumstances, Natera's
 17 position on the question was not unreasonable or sanctionable, and Guardant does not cite (and
 18 never cited at the time) a single case suggesting otherwise.

19 Guardant is also wrong that Natera's supposed "violation" of the Joint Stipulation "justifies
 20 a determination that this is an exceptional case." Dkt. 885-2 at 8. There was never a finding of any
 21 such violation; indeed, Guardant never even sought one. All that Guardant points to is a webinar
 22 less than one week following the entry of the Joint Stipulation (Dkt. 885-2 at 8)⁵ and one instance
 23 [REDACTED]

24 ⁴ Guardant's other authority, *Jason Scott Collection, Inc. v. Trendily Furniture, LLC* (cited Dkt.
 25 885-2 at 3), is even further afield. In that case, the defendant "precisely copied" plaintiff's
 trademarks and repeatedly ignored multiple cease-and-desist letters over more than three months.
 68 F.4th 1203, 1223 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 550 (2024).

26 ⁵ Guardant cites no evidence to support its assertion that Natera "repeated many of the same false
 27 comparisons" during its June 10 webinar. Instead, it alleges that "review[ing] tumor informed vs.
 tumor-uninformed tests in more detail" is automatically a "false comparison." Dkt. 885-2 at 8. But
 28 Guardant's own sales team compared Reveal and Signatera to customers, describing Signatera as
 "tissue dependent" and explaining how Reveal "would take the place of Signatera." TX1810.

1 where one salesperson sent an e-mail *three days* after the Joint Stipulation was entered (Dkt. 885-2
 2 at 12). If Guardant actually thought these constituted violations, it needed to [REDACTED]
 3 [REDACTED]. Dkt. 25-3, ¶ 5. Only after [REDACTED]
 4 [REDACTED]
 5 [REDACTED]. *Id.* But
 6 Guardant never followed this process, because it would never be able to establish an actual violation.
 7 In fact, the only time Guardant ever sought relief for an alleged violation (consisting of a single e-
 8 mail to a single recipient) was in the midst of trial, and Guardant plainly did that only to seek an
 9 advantage in trial—as demonstrated by the fact that Guardant ignored the mandatory process for
 10 asserting an alleged breach of the Joint Stipulation, *rejected* Natera’s offer to send an immediate
 11 curative email, and instead sought only the relief of “allotting some of Natera’s [trial] time to
 12 Guardant” without any meet and confer or demonstration of bad faith. Dkt. 803; Dkt. 807 (Natera
 13 explaining it proposed a curative statement and committed to providing the information Guardant
 14 requested). Guardant cites *Nat’l Grange of the Ord. of Patrons of Husbandry v. California State*
 15 *Grange*, 182 F. Supp. 3d 1065 (E.D. Cal. 2016) and *T-Mobile USA, Inc. v. Terry*, 862 F. Supp. 2d
 16 1121 (W.D. Wash. 2012), but those cases involved a defendant repeatedly violating a preliminary
 17 injunction, in truly egregious circumstances, and where—unlike here—the preliminary injunction
 18 did not include a mandatory process to resolve, cure, or potentially raise perceived violations. *Nat’l*
 19 *Grange*, 182 F. Supp. 3d at 1085 (defendant used the name “Grange” on its public website, billing
 20 statements, and endorsed checks for over six months following injunction, even though it could have
 21 corrected or removed the information at any time); *T-Mobile USA*, 862 F. Supp. 2d at 1133, 1135
 22 (defendant found in contempt for violating preliminary injunction by continuing to advertise and
 23 sell infringing product, refusing to cooperate in discovery and repeatedly violating court orders).⁶

24
 25 ⁶ Nor is it appropriate for Guardant to analogize the Joint Stipulation to an injunction, when
 26 Guardant’s primary argument to sustain it over Natera’s objection was that it *did not* function as an
 27 injunction. See Dkt. 122-2 (Guardant describing the Joint Stipulation as “[REDACTED]”); Dkt.
 28 144-2 (Joint Stipulation “[REDACTED]”); Dkt. 151 (“[REDACTED]”); Dkt. 423 (“[REDACTED]”).

1 Finally, Guardant’s assertion that Natera’s “anticompetitive motivation for pursuing its false
 2 advertising campaign further supports willfulness” is similarly baseless. Dkt. 885-2 at 4. The only
 3 case Guardant cites to support that proposition does not even address the issue of willfulness and,
 4 in any event, is nothing like this case. In *H.I.S.C. v. Franmar Int’l*, 2020 WL 6263649 (S.D. Cal.
 5 Oct. 22, 2020), the plaintiff had used information obtained from a three-year working relationship
 6 with the defendant to set up a competing enterprise and then filed a lawsuit in an attempt to “drive
 7 Defendants out of business.” *Id.* at *3. The court found that plaintiffs had an anti-competitive
 8 motivation for *filing the meritless lawsuit*, thus establishing an “unreasonable litigation position”
 9 warranting fees. *Id.* Here, Guardant initiated this lawsuit, and Guardant does not allege (and
 10 certainly has never proven) that Natera’s counterclaims were filed for anti-competitive purposes.

11 C. Natera’s Litigation Conduct Does Not Warrant Fees & Costs

12 This is not “the rare case” in which litigation conduct warrants fees. *Octane Fitness, LLC*,
 13 572 U.S. at 555. This was a hard-fought case in which both sides zealously represented their clients
 14 and advocated for their client’s best interests. Courts have rejected requests for attorneys’ fees even
 15 where a party alleges far worse litigation conduct than Guardant (inaccurately) does here. In
 16 *BillFloat*, for example, the court held that a party’s litigation conduct did not render the case
 17 exceptional, despite the party “fail[ing] to conduct pre-suit investigation, producing roughly 98,000
 18 documents without an index, refusing to produce basic documents, obstructive deposition conduct,
 19 joining [a] defendant in bad faith, and proceeding to trial [] without sufficient evidence.” *BillFloat*
 20 *Inc.*, 2023 WL 2333879, at *7. Guardant points to a smattering of perceived grievances (Dkt. 885-
 21 2 at 13-16)—most of which occurred during the four-week trial—but none rises to the level of
 22 misconduct justifying a fee award at all, much less a \$27 million award representing the entirety of
 23 Guardant’s attorneys’ fees and costs across nearly four years of litigation. There is nothing
 24 “exceptional” about the cherrypicked instances Guardant selects; they are the same sort of run-of-
 25 the-mill complaints that any party could cite after any hotly-contested case.

26 At the end of the day, Guardant merely reasserts various complaints it raised during trial,
 27 and that the Court already addressed. None of these—alone or in combination—entitles Guardant
 28 to fees. Guardant attempts to fault Natera for supposedly seeking to “re-litigate” issues through

1 these proceedings (Dkt. 885-2 at 12), but the fact a legal proposition is repeatedly rejected “does not
 2 necessarily mean that the legal position was objectively unreasonable or frivolous at the time that it
 3 was taken.” *Luken v. Int’l Yacht Council, Ltd.*, 581 F. Supp. 2d 1226, 1240 (S.D. Fla. 2008) (noting
 4 that the trial court’s repeated rejection of a theory did not make it unreasonable as it pertained to
 5 assessing attorney fees). Indeed, to properly preserve issues for appeal—of which there are many
 6 in this case—it is often necessary to repeat or renew previously rejected arguments. *Id.* This applies
 7 to essentially all of the examples Guardant cites, including Natera’s disagreement with the novel
 8 jury instruction that incorporated the colloquial turn of phrase, “apples-to-oranges” (*see* Dkt. 627;
 9 Dkt. 880), and Natera’s position that a California common law false advertising claim is limited to
 10 “passing off” one’s goods as those of another. Dkt. 627 at 5.

11 Regardless, Guardant itself repeatedly raised and reraised its own issues throughout this
 12 case. For example, even after Guardant *stipulated* to the admissibility of earnings call transcripts
 13 (Dkt. 732 at 3), Guardant objected to their use during opening statements (Dkt. 766), and again twice
 14 during Helmy Eltoukhy’s testimony (Tr. 788:13-790:25; Tr. 795:20-25). Similarly, Guardant
 15 repeatedly objected to use of TX-585. Guardant first objected to its use in opening statements (Dkt.
 16 766) and then again to its use during closing arguments (Dkt. 828), despite the extensive discussion
 17 that had taken place of the exhibit prior to that time.

18 Guardant also repeatedly sought to relitigate Natera’s motion *in limine* regarding MolDX.
 19 Natera brought the motion to prevent Guardant from arguing that Natera interfered with Guardant’s
 20 ability to receive Medicare approval. Dkt. 509. Nevertheless, from the very start it was **Guardant**
 21 that tried to make MolDX the centerpiece of its case, offering a slanted story on the issues that the
 22 *in limine* orders actually excluded. *See e.g.*, Tr. 202:11-12 (“The second part of the war was to lie
 23 to Medicare, behind the scenes, about Reveal.”); Tr. 206:14-206:19 (“Medicare’s internal experts []
 24 considered Natera’s argument, including many of the same attacks Natera will repeat to you, and
 25 they rejected them. They approved Reveal for Medicare coverage. So Natera’s claims to Medicare
 26 were false[.]”). After framing its entire case around these issues, Guardant attempted to use the *in*
 27 *limine* order that precluded **Guardant** from introducing MolDX evidence to instead prevent **Natera**
 28 from refuting Guardant’s false assertions that MolDX agreed with Natera’s criticisms of Reveal’s

1 advertised performance and underlying data. It is obvious why Guardant fought so mightily to keep
 2 this evidence out, given Guardant's own Vice President of Reimbursement *agreed* with the concerns
 3 Natera expressed to MolDX. TX612. But the fact that Natera introduced (over Guardant's
 4 objection, *e.g.*, Tr. 318:10-13) this highly relevant, and permissible, information is not litigation
 5 misconduct, and Guardant does not cite any order Natera violated in presenting the evidence it did.

6 Guardant also mischaracterizes Natera's presentation of mitigation evidence. The Court's
 7 ruling on Natera's Motion *in limine* No. 4 recognized that "[REDACTED]
 8 [REDACTED]
 9 [REDACTED]." Dkt. 509 at 17. Accordingly, and
 10 as Guardant acknowledges (Dkt. 885-2 at 15), Natera was permitted to introduce evidence that
 11 Guardant could have, but did not, engage in mitigation of its purported damages. Natera's questions
 12 were aimed at doing just that. Tr. 1868:11-1869:1 (Dr. Stec testifying that Guardant had the
 13 resources to conduct corrective advertising but did not). Indeed, Guardant's motion does not point
 14 to a single instance in which Natera asked about *comparative* corrective advertising. Regardless,
 15 the Court has already rejected Guardant's attempt to seek sanctions based on this line of questioning.
 16 Dkt. 878. Guardant should not be permitted to do an end-run around that order by seeking fees
 17 based on the same conduct.

18 Guardant also complains that Natera put too many exhibits on its exhibit list, but points to
 19 no authority supporting its position that the number of exhibits was "beyond preposterous," or that
 20 an exhibit list of this size (in this complex case) warrants an award of a party's fees throughout the
 21 entire litigation. Dkt. 885-2 at 14. Nor could it. As the defendant in a large, complex case regarding
 22 technical cancer recurrence assays, Natera needed to preserve flexibility to respond to Guardant's
 23 presentation of its case.⁷ Guardant reiterates its complaint that Natera exchanged too many closing
 24

25 ⁷ This was all the more true given Guardant's history of opportunistically shifting its allegations
 26 throughout this litigation. For example, Guardant first argued that Natera's commercial statements
 27 were necessarily false because there had been no head-to-head study between Reveal and Signatera.
 28 See Dkt. 12-1 at 8; Dkt. 12-3 ¶ 16. But discovery showed that Guardant itself was making
 comparative statements without any head-to-head study when doing so would be advantageous to
 Guardant. See *e.g.*, TX507.1; TX585.7; TX641.1; TX729.19. Guardant then changed its tack,

1 slides, once again without citing any supporting authority. Dkt. 885-2 at 15. This Court has twice
 2 rejected Guardant’s complaints on this issue, and Guardant is the one that acted improperly in this
 3 exchange—first by refusing to meet and confer, and then by raising objections (and forcing Natera
 4 to submit briefing) on essentially every single slide, only to have the Court reject essentially every
 5 objection. *See* Tr. 1198:18-19 (recognizing this “is a complicated case with complicated issues”);
 6 Dkt. 878 (denying Guardant’s request to move for sanctions based on closing slides).

7 Guardant further argues that Natera’s deposition designations were excessive (Dkt. 885-2 at
 8 14-15), but those designations were appropriate in light of the continued uncertainty regarding
 9 which witnesses Guardant intended to bring to trial. Indeed, Guardant unexpectedly dropped
 10 witnesses throughout trial (including Dr. Parikh herself and Thereasa Rich), rendering their
 11 deposition testimony, and Natera’s designations, necessary. Additionally, although the Court
 12 deducted one hour of trial time from Natera due to the number of objections it made to Guardant’s
 13 deposition designations (10/15 Hearing Tr. at 138:21-139:4), those objections were warranted and
 14 in good faith, as the trial presentation bore out. Most notably, Natera properly objected to
 15 Guardant’s designation of testimony where Dr. Corcoran cried about being upset by being served
 16 with a subpoena, and the Court overruled that objection. Once the designation was actually played
 17 at trial, however, Natera’s objection that the testimony was prejudicial was borne out, and the Court
 18 gave a curative instruction. Tr. 1150:8-11; 1382:10-16.⁸

19 Guardant also cherry picks a handful of complaints from the discovery period. For example,
 20 Guardant complains that Natera produced documents immediately before the substantial completion
 21 deadline, but points to no violation of any deadline or even any prejudice that resulted from the
 22 timing of Natera’s production. Dkt. 885-2 at 12 n.6. And while Guardant asserts that Natera
 23 “renege[d]” on a purported agreement regarding the close of discovery (*id.*), the Court ***agreed with***
 24

25 arguing that its own side-by-side comparisons were appropriate, while Natera’s were unlawful. *See*
 26 Tr. 490:4-13 (Price) (“Internally I think it was okay [to compare Reinert and Parikh]); Tr. 384:24-
 385:23 (Odegaard) (“Q. And you don’t see anything false or misleading in this presentation
 27 [comparing Reinert and Parikh]; right, sir? A. Not at all.”).

28 ⁸ Even if fees were appropriate for the time Guardant spent reviewing Natera’s trial exhibits,
 closing slides, and deposition designation (they are not), Guardant does not limit its fees request to
 the incremental time it contends resulted from these incidents.

1 *Natera* that its discovery requests were timely and ordered Guardant to respond. Dkt. 176. This
 2 was an example of *Guardant* taking an unreasonable position that multiplied proceedings.⁹

3 Finally, Guardant flings baseless complaints regarding the deposition of Dr. Claus Andersen.
 4 Dkt. 885-2 at 13-14. At no point did Natera make any false representations to the Danish authorities
 5 regarding the evidence from Dr. Andersen. Natera accurately informed the Danish authorities that
 6 this Court indicated that evidence of the Reinert Study could be used only for a very limited
 7 purpose: to “shed[] light on the meaning of ‘prospective’ and ‘blinded’—which are the subject of
 8 Natera’s counter-claims against Guardant (asserting the Parikh study is fraudulent because those
 9 terms were mischaracterized) is properly admitted for purposes of impeaching Natera’s
 10 assertions.” Dkt. 572 at 15. Natera objected to Guardant’s Letters of Request because, despite the
 11 Court’s rulings, Guardant’s requests did not use the terms “blinded” or “prospective,” and, instead,
 12 sought broad categories of information regarding the Reinert Study unrelated to those
 13 terms. Indeed, Guardant’s own submissions to the Danish authorities indicated that it intended to
 14 seek information regarding Dr. Andersen’s “additional research” related to the Reinert Study and
 15 also about how the Reinert Study was conducted more generally—even though the Court dismissed
 16 Guardant’s affirmative defense based on those subjects at summary judgment. Dkt. 326 at 43
 17 (dismissing unclean hands affirmative defense). And this was further confirmed in Dr. Andersen’s
 18 deposition when Guardant’s two days of questioning went well beyond seeking information
 19 regarding the terms “blinded” or “prospective.” Dkt. 821-1 (Andersen Tr.) at 83:2-95:17. The
 20 information sought was in no way targeted as Guardant suggests.

21 Nor does Guardant’s reliance on *SRI Int’l, Inc. v. Cisco Sys., Inc.*, 14 F.4th 1323 (Fed. Cir.
 22 2021) support an exceptional-case finding here. There, the Federal Circuit allowed an award of fees
 23 in a patent infringement case in which the district court found that the defendant had, among other
 24 things, maintained nineteen invalidity theories but only presented two at trial, and presented non-

25
 26 ⁹ Unsurprisingly, there are countless other instances of Guardant acting unreasonably and
 27 multiplying proceedings. For example, it refused to produce *any* documents from Dr. Helmy
 28 Eltoukhy, or to present him for a deposition, even though he was a central figure in this case. *See*
 Dkt. 199. And it refused to run any searches on the records of its former Senior Director of
 Corporate Communications until ordered to do so by the Court. Dkt. 194.

1 infringement theories that were contrary to both the claim construction ruling and the defendant's
 2 internal documents. *Id.* at 1332. No similar facts are present here. And in *Yuga Labs, Inc. v. Ripps*,
 3 2023 WL 7089922 (C.D. Cal. Oct. 25, 2023), *appeal docketed* No. 24-879, (9th Cir. Feb. 20, 2024),
 4 the district court made a finding that defendants "made disgraceful and slanderous comments,"
 5 including referring to plaintiff's counsel as "criminals" who support "racism, antisemitism,
 6 beastiality [sic], pedophilia," and accused them of "using cartoons to market drugs to young
 7 children." *Id.* at 20. Nothing remotely similar can be said of Natera's conduct in this case.¹⁰

8 **D. Attorneys' Fees Are Not Necessary To Deter Natera And Others, Or To**
 9 **Compensate Guardant**

10 Where, as here, a party's litigation positions were neither baseless nor frivolous, "there is no
 11 need to deter future plaintiffs or to compensate Defendants." *Blue Bottle Coffee*, 2024 WL 4004047
 12 at *5; *see also Site Update Sols., LLC v. Accor N. Am., Inc.*, 2015 WL 581175, at *4 (N.D. Cal. Feb.
 13 11, 2015), *aff'd sub nom. Site Update Sols., LLC v. CBS Corp.*, 639 F. App'x 634 (Fed. Cir. 2016)
 14 (where a party's litigation position was "not entirely frivolous or objectively unreasonable, the court
 15 also does not need to find th[e] case exceptional in order to deter others from imitating [the party's]
 16 conduct"); *Sophia & Chloe, Inc. v. Brighton Collectibles, Inc.*, 2019 WL 1429588 at *5 (C.D. Cal.
 17 Mar. 29, 2019) (same). As discussed above, Natera's litigation positions were objectively
 18 reasonable, not frivolous, and Natera introduced ample evidence to support its claims and defenses.

19 Guardant cites *TrafficSchool.com, Inc.*, 653 F.3d at 832, to argue that an award of attorneys'
 20 fees "would also recognize the benefit of the verdict" to the public. Dkt. 885-2 at 8. In *Traffic*
 21 *School*, however, the judge presiding in a bench trial awarded no monetary relief. Thus, the court
 22 held "[i]t would be inequitable to force plaintiffs to bear the entire cost" of obtaining judgment and
 23

24 ¹⁰ Guardant, by contrast, repeatedly likened Natera's commercial statements to murdering babies.
 25 Tr. 740:8-10 (Eltoukhy) ("I mean, it's like you gave birth to a beautiful baby and then someone just
 26 ripped that baby out of your hands and slammed its head against the wall."); Tr. 190:8 (Keller) ("The
 27 goal was to kill Guardant's new test in the crib."); 8/8/24 Hearing Tr. 20:11-13 (LaVigne) ("The
 28 goal was to destroy, literally destroy Reveal in the crib to eliminate the competitor"); 5/1/24 Hearing
 Tr. 58:17-18 (Perloff) (Natera was "strangling the product in the crib"); Dkt. 600-2 ("Natera ignores
 that it did its best to smother Reveal in its virtual crib by falsely comparing *Signatera* to *Reveal*.").
 And Guardant's counsel had such excessive improper questioning that the Court admonished them.
 Tr. 1057:7-23 (Court instructing counsel to ask "crisp, non-compound loaded question[s]").

1 relief in the form of an injunction. *Id.* Here, by contrast, the jury already awarded Guardant \$250.5
 2 million in damages and recommended that Guardant be awarded an additional \$42 million in
 3 disgorgement. Thus, Guardant does not have to bear the “entire cost” of obtaining judgment and
 4 relief against Natera; there is little need for further deterrence or compensation given the substantial
 5 jury award.

6 **III. THE COURT SHOULD EXERCISE ITS DISCRETION TO DENY GUARDANT’S** 7 **REQUEST FOR FEES AND COSTS**

8 Even if a court determines a case is “exceptional,” it then must determine whether an award
 9 of attorneys’ fees is reasonable. *SunEarth*, 839 F.3d at 1180. The “plain language of the statute
 10 allows the court to choose whether to award fees, even after finding the case exceptional.” *Fifty-*
 11 *Six Hope*, 778 F.3d at 1079 (citing 15 U.S.C. § 1117(a)). For all the reasons set forth above that this
 12 is not an “exceptional” case, the Court should exercise its discretion to deny Guardant’s motion
 13 because Guardant’s requested fees are not adequately supported. But at a minimum, this Court
 14 should not award Guardant all of the \$27 million in attorneys’ fees and costs that it seeks. Guardant
 15 failed to apportion its requested fees between Lanham Act and non-Lanham Act claims, did not
 16 remove non-recoverable fees from its request, and failed to provide adequate documentation for its
 17 millions of dollars of requested costs.

18 **A. Guardant Fails To Apportion Fees Incurred On The Lanham Act Claims**

19 “As a general matter, a prevailing party in a case involving Lanham Act and non-Lanham
 20 Act claims can recover attorneys’ fees only for work related to the Lanham Act claims.” *Gracie v.*
 21 *Gracie*, 217 F.3d 1060, 1069 (9th Cir. 2000); *see also Dominick v. Collectors Universe, Inc.*, 2013
 22 WL 990825, at *4 (C.D. Cal. Mar. 13, 2013) (“Defendants’ success on their Lanham Act claim (had
 23 exceptional circumstances existed here) would have entitled them *only* to fees fairly attributable to
 24 their work on the Lanham Act claim and no more—not all of their fees, as they contend in their
 25 motion papers”).

26 Despite this clear limitation, Guardant seeks essentially all of the fees it has incurred since
 27 the inception of this case over 3.5 years ago. Guardant has not made *any* attempt to apportion its
 28 fees to those incurred in connection with its Lanham Act claim, as opposed to those incurred in

1 connection with its common law false advertising claim, or its statutory unfair competition and false
 2 advertising claims, or to defend against Natera’s non-Lanham Act counterclaims. Although some
 3 of Guardant’s fees may have gone to both Lanham Act and non-Lanham Act claims, much of its
 4 work demonstrably did not. For example, Guardant does not separate out non-recoverable fees
 5 incurred for time spent to [REDACTED] or “[REDACTED]
 6 [REDACTED]” (e.g., Dkt. 885-4 at 6, 104). *See also* Dkt. 891-
 7 5 (T. Herbert entry: “[REDACTED]”; N. Romo entry:
 8 “[REDACTED]
 9 [REDACTED]”). Guardant must separate these plainly non-Lanham Act related fees out from
 10 its request, as the Court may not award fees for work unrelated to the Lanham Act.

11 For the remaining entries that do ostensibly relate to the Lanham Act claims, Guardant fails
 12 to account for the fact that some of that time was spent on issues not specific to the Lanham Act.
 13 For example, Guardant does not apportion its fees for summary judgment briefing (e.g., Dkt. 885-
 14 10 at 74-98), which must be reduced to account for the fact that Guardant’s motion addressed
 15 Natera’s state law UCL and FAL claims (Dkt. 226), and Natera likewise moved on Guardant’s UCL
 16 and common law claims (Dkt. 220). The jury instructions and verdict form also addressed the
 17 parties’ common law claims, as well as willfulness, which is not an element of the Lanham Act
 18 claims. *See* Dkts. 507, 543-5, 610, 612.

19 Where a party makes no effort to apportion out fees for non-Lanham-Act claims, the court
 20 must adjust the fee award. *Gracie*, 217 F.3d at 1070. Even if “an *exact* apportionment” of fees is
 21 impossible, the district court still has a “duty to make *some* attempt to adjust the fee award in an
 22 effort to reflect an apportionment.” *Id.* at 1069 (emphasis in original). Reducing a total attorney
 23 fee amount by a percentage that represents work on non-recoverable non-Lanham Act claims is one
 24 method courts have used to apportion attorneys’ fees. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139,
 25 1158 (9th Cir. 2002) (affirming district court’s decision to reduce attorneys’ fees sought by twenty-
 26 six percent where defendant did not apportion fees related to Lanham Act claims); *BillFloat Inc.*,
 27 2023 WL 2333879 at *7 (finding case not exceptional and thus finding no entitlement to fees under
 28 the Lanham Act, but reducing fees awarded based on contract claims by 25 percent “because the

1 record makes it difficult to discern with any degree of precision which portion of the fees may have
 2 been devoted to the Lanham Act claim”); *B & H Mfg. Co. v. Lyn E. Bright*, 2006 WL 547975, at *4
 3 (E.D. Cal. Mar. 3, 2006) (reducing fees related to specific motions by 50 percent where motions
 4 related to both Lanham Act and non-Lanham Act claims).

5 The Court should reject Guardant’s unsupported attempt to shift its entire legal bill onto
 6 Natera. At minimum, the Court should reduce Guardant’s fee request by at least 25 percent to
 7 account for Guardant’s requested fees for work exclusively related to non-Lanham Act claims (*e.g.*,
 8 Dkt. 891-5 at 156 (“[REDACTED]”)), and an additional 50 percent
 9 to account for Guardant’s failure to apportion fees for work related to both Lanham Act and non-
 10 Lanham Act claims (*e.g.*, *id.* at 148 (“[REDACTED]”)).
 11 [REDACTED]”).

12 **B. Guardant Seeks Reimbursement Of Unrecoverable Fees**

13 In addition to failing to allocate fees incurred in connection with Guardant’s Lanham Act
 14 claim, Guardant seeks to tax Natera for fees that resulted from Guardant’s mistakes and misconduct
 15 in this action, or that are wholly unrelated to the merits of the case. To take just a few examples,
 16 Guardant taxes Natera for “[REDACTED],” and
 17 “[REDACTED]” Dkt. 891-5 at 122, 123.
 18 This is a reference to Guardant filing Natera’s confidential materials on the public docket in this
 19 case, in violation of the Protective Order. *See* Dkt. 57 (Stipulated Protective Order); Dkt. 339
 20 (Guardant Motion to Remove Incorrectly Filed Document); Dkt. 377 (same); Dkt. 431 (same).
 21 Guardant’s mishandling and improper disclosure of Natera’s confidential material unfortunately
 22 happened multiple times, and there is no legitimate basis for Guardant to shift the fees resulting
 23 from its own violation of a Court order onto Natera.

24 Guardant also requests that Natera pay for it to [REDACTED]
 25 [REDACTED] (Dkt. 891-5 at 135) and [REDACTED]
 26 [REDACTED]” (*id.* at 137). Such ministerial tasks have no relation to the merits
 27 of the case and should not be taxed. *See Mendoza v. Brewster Sch. Dist. No. 111*, 469 F. Supp. 2d
 28 905, 917 (E.D. Wash. 2006), *judgment entered*, 2007 WL 1140259 (E.D. Wash. Apr. 17, 2007)

(excluding administrative tasks from award of costs); *Nahas v. Cont'l Cas. Co.*, 2010 WL 2176067, at *10 (D. Haw. May 26, 2010) (deducting “time for clerical or ministerial tasks” from fee award).

Guardant next requests \$[REDACTED] in fees incurred by the law firm Jones Day, which never entered an appearance in this case. Based on a review of the billing entries, it appears Jones Day was retained for the sole purpose of [REDACTED]. Guardant has not justified this expense. *See Parvin v. CNA Fin. Corp.*, 2014 WL 13109295, at *1 (D. Or. Jan. 28, 2014) (declining to award costs incurred in connection with mock trial where the prevailing party “has not justified the mock trial costs as reasonably necessary in the circumstances of this case”); *cf. MJC Am., Ltd. v. Gree Elec. Appliances, Inc. of Zhuhai*, 2015 WL 13917934, at *4 (C.D. Cal. July 28, 2015), *on reconsideration in part*, 2015 WL 13917932 (C.D. Cal. Sept. 14, 2015) (granting a partial award of costs (not fees) “incurred in the preparation of trial graphics for use at the mock trial,” but only because many of the graphics were also used at trial).

C. Guardant’s Request For Costs Is Unsupported And Excessive

Since Guardant has failed to supply “adequate documentation” supporting the \$4,916,182.55 of costs it seeks, exclusion of the entire amount is warranted. *Apple Inc. v. Samsung Elecs. Co.*, 2014 WL 4745933, at *9 (N.D. Cal. Sept. 19, 2014) (excluding all copying costs where the prevailing party failed to supply adequate documentation to support its request).

For example, Guardant’s attempt to recover \$63,051.26 for video recordings of what appears to be *every* deposition taken in this case is an overreach. *See Total Recall Techs. v. Luckey*, 2017 WL 2118297, at *1 (N.D. Cal. May 16, 2017) (rejecting a “blanket omnibus approach to videotap[ing] every deposition”). While impossible to know for sure, given that Guardant provided no back-up documentation supporting the costs, it appears Guardant even paid (and seeks to stick Natera with the bill) for the videos of depositions of Guardant’s own witnesses within its control and who it had committed to bring to trial. These are not recoverable, especially since no disputes in this case “involved deposition conduct or any other issue that might have been resolved with videotapes.” *Id.* at *1. Likewise, Guardant’s request of \$227,629.39 (Dkt. 891-22) for what appears to be transcripts from every deposition, and without any underlying invoices, is excessive and unsupported. Although it is impossible to know for sure given the lack of supporting documentation,

1 this averages to \$5,836.65 per deposition across the 39 depositions listed, which likely means that
 2 Guardant’s bill includes rush transcripts, extra fees for multiple real time feeds, or other
 3 impermissible costs. *Plantronics, Inc. v. Aliph, Inc.*, 2012 WL 6761576, at *6 (N.D. Cal. Oct. 23,
 4 2012) (costs of expedited delivery of deposition transcripts not recoverable); *PNY Techs., Inc. v.*
 5 *Miller, Kaplan, Arase & Co., LLP*, 2017 WL 3712107, at *2 (N.D. Cal. Aug. 29, 2017) (holding
 6 that costs for “Realtime” fees, “reporters’ fees for preparation of rough copies of deposition
 7 transcripts,” and “Litigation Package” charges were not recoverable).

8 **D. Guardant’s Request For Non-Taxable Costs Should Be Denied**

9 Guardant acknowledges that it seeks reimbursement for non-taxable costs; the Court should
 10 decline to award them.

11 Guardant requests \$418,306.45 for “TravelMealsLodging” (Dkt. 891-22 at 1) but provides
 12 no itemized breakdown for any portion of that amount. One cannot determine, for instance, which
 13 hotels Guardant used, at what rate, and for what purpose. Nor can one determine what class of
 14 airfare Guardant purchased. This type of information is necessary to determine whether the costs
 15 incurred were reasonable—even if they were taxable in the first place. *In re Media Vision Tech.*
 16 *Sec. Litig.*, 913 F. Supp. 1362, 1372 n.10 (N.D. Cal. 1996) (finding it “unacceptable that some firms
 17 expect reimbursement for first class airline tickets or last minute ticket purchases which doubles the
 18 cost of airfare, luxury hotel accommodations,” and expensive meals); *Hellenberg v. Ford Motor*
 19 *Co.*, 2020 WL 1820126, at *7 (S.D. Cal. Apr. 10, 2020) (reducing requested costs where first-class
 20 air travel was not “reasonably necessary”).

21 Guardant’s request for \$650,875.39 in “Document Mgmt” (Dkt. 891-22 at 1) is likewise
 22 improper, as it is entirely unsupported by any invoices or other backup detail.

23 Guardant’s request for \$1,283,808.21 for what is vaguely referred to as “Legal Consultants”
 24 (*id.*) should likewise be stricken. Guardant identifies four different companies who apparently acted
 25 as “consultants” but provides no information as to what any of the companies did for Guardant, how
 26 that work differed from the legal work that Guardant’s attorneys provided, or why the costs incurred
 27 from their services were reasonably necessary to this case. In support of the request, Guardant relies
 28 on one inapposite case in which the supporting declarations “provide[d] a sufficient description of

1 the costs,” but Guardant did not provide *any* description here, much less a sufficient one. *Planned*
2 *Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 2020 WL 7626410, at *8 (N.D. Cal. Dec.
3 22, 2020), *aff'd*, No. 21-15124, 2024 WL 4471745 (9th Cir. Oct. 11, 2024). And in *Baker v.*
4 *SeaWorld Ent., Inc.*, 2020 WL 4260712, at *11 (S.D. Cal. July 24, 2020), cited Dkt. 585-2 at 22, the
5 court specifically noted that there had been no objection to the expense request. Here, with no
6 attempt to support these costs, they must be denied.

7 In addition to the over \$1.28 million of “Legal Consultants,” Guardant also requests
8 \$100,345.50 for an expert named “Ogenstad,” who Guardant says provided “Consulting & Expert
9 Services” in 2022. (Dkt. 891-22 at 11). Ogenstad, whose subject of expertise is not identified,
10 provided no expert reports in this matter and played no role at trial. Yet Guardant seeks to tax Natera
11 for the entirety of the work he or she did (whatever it was). That request should be stricken.

12 In addition to the expert that Guardant never used, Guardant seeks an additional
13 \$1,821,712.13 in costs related to three experts—Malackowski, Sowers, and Heitjan—again without
14 any supporting documentation to support those amounts. Guardant cites *Dropbox, Inc. v. Thru Inc.*,
15 but there, this Court approved expert fees in the amount of \$162,936 only after finding that Dropbox
16 has “adequately explained the necessity of the costs incurred, and it has thoroughly documented its
17 specific expenditures.” 2017 WL 914273, at *6 (N.D. Cal. Mar. 8, 2017), *aff'd*, 728 F. App’x 717
18 (9th Cir. 2018). No such explanation or documentation has been provided here. In fact, counsel
19 has not even included the invoices that the experts surely provided to either counsel or Guardant
20 accounting for their time. Instead, counsel merely identifies the top line number of costs incurred
21 and then declares that “the non-taxable costs incurred by Guardant were reasonable and necessary.”
22 Dkt. 885-9 ¶¶ 5F, 5G. Guardant’s request is deficient.

23 CONCLUSION

24 Guardant’s unsubstantiated request for attorneys’ fees and costs amounts to an excessive
25 windfall. For the reasons set forth above, Guardant’s motion should be denied.

1 DATED: February 14, 2025

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4 By /s/ Kevin P.B. Johnson

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